

Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age

HON. BRUCE M. SELYA*

The legal career of one of my most distinguished colleagues, Bailey Aldrich, has very nearly spanned a legal millennium. His name first appeared in the *Federal Reporter* in 1939,¹ and I have every hope and expectation that his opinions will grace the corresponding pages of the third edition of the *Federal Reporter*—a milestone which is fast upon us. The next legal millennium, at current rates of publication, will fall about the same time that my grandson, Brad Sherman, now still in diapers, will be pondering the decision to attend law school. And if recent trends continue, the time is not too far distant when the partnership track at major law firms will exceed in duration one full iteration of the *Federal Reporter*.

Of course, this development is not new. Reservations have been voiced for many years about the proliferation of judicial opinions, legal commentary, and the like. In 1962, a prominent attorney announced with horror that if all the law books in Harvard Law School's library were aligned in a single row, they would require a shelf thirty-nine miles long.² The mind boggles at the calculation of how long that shelf would be today. If these millions of printed pages illuminated vistas, or if their sheer bulk served some other useful purpose, I would gladly suffer the indignities of wading through them. But I question whether the game is worth the candle.

At the risk of being called parochial, I confess that I am concerned both about the contribution of the federal appellate judiciary to the oceans of paper that have emerged and about the toll that producing that paper exacts. (I write today in terms of the federal appellate judiciary—but the phenomena that worry me are, I suspect, indigenous to most American appellate courts.) Perhaps the most damning assessment of the output of the federal appellate bench is that of Dean Roscoe Pound, who concluded as follows:

After reading upwards of fourteen hundred double-column pages of judicial opinions, carefully sifted from many thousands of pages in the National Reporter System, one is impelled to ask why paper, printer's ink, labor, and shelfroom should be devoted to the perpetuation of what for the

* Judge, U.S. Court of Appeals, First Circuit; B.A., Harvard College, 1955; J.D., Harvard Law School, 1958.

¹ See *Stewart v. Connecticut Mut. Life Ins. Co.*, 102 F.2d 147, 147 (1st Cir. 1939).

² Eugene M. Prince, *Law Books, Unlimited*, 48 A.B.A. J. 134 (1962), excerpted in APPELLATE JUDICIAL OPINIONS 309, 310 (Robert A. Leflar ed., 1974).

largest part is avowedly but repetition of things long familiar and is too often merely elaborate elucidation of the obvious.³

Dean Pound put the point rather sharply, but the object of this essay is not so much to answer his question as to echo the sentiments—rhetorical, in any event—that prompted the question, and to make it clear that, in the years since Dean Pound voiced his lament, the situation has deteriorated rather than improved.

To be sure, the glut of appellate opinions can be viewed as just another casualty of the litigation explosion. Complaints of a case load crisis are commonplace,⁴ and they seem well-founded. Despite creative attempts to prove that this crisis is a figment of our collective imagination,⁵ the everyday experience of sitting federal judges and the best statistical analyses available amply confirm the urgency of the situation.⁶ And while cases are proliferating everywhere, they are multiplying most rapidly at the appellate level. The pressure from beneath is building, with a growing base of district court cases, and an even more drastically increasing rate of appeal. At the same time, the top of the pyramid is unable to absorb any of the structural stress; the number of cases heard by the Supreme Court remains at best constant, and the ratio of appellate court dispositions to granted petitions for certiorari has dropped to an all-time low. The remaining blocks of the pyramid, the circuit courts, are, literally and figuratively, caught in the middle.

By accident or design, the federal appellate judiciary's institutional response has mirrored what transpired earlier at the district court level. We have resorted increasingly to case management techniques: settlement

³ APPELLATE JUDICIAL OPINIONS, *supra* note 2, at 309 (quoting Roscoe Pound).

⁴ See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 59–93 (1985) (discussing increase in federal judicial business since 1960).

⁵ See, e.g., Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Austin Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319 (1985).

⁶ For an intriguing example of the judicial perspective, see Abner J. Mikva, *The Lester W. Roth Lecture: For Whom Judges Write*, 61 S. CAL. L. REV. 1357 (1988). For an excellent, relatively recent statistical survey, see Vincent Flanagan, *Appellate Court Caseloads: A Statistical Overview* (Sept. 14, 1989), in 2 FEDERAL COURTS STUDY COMMITTEE, *WORKING PAPERS AND SUBCOMMITTEE REPORTS*, pt. II-D (July 1, 1990). The best recent compendiums of the conventional wisdom may be found in *THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY* (Federal Judicial Ctr. ed., 1989) [hereinafter JUDICIARY] and *FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE* (April 2, 1990) [hereinafter FCSC REPORT].

programs, screening programs, "rocket" dockets, and the like.⁷ Many of these innovations are laudable, but, like using one's fingers to plug a holed dike, they have two shortcomings. First, we have only a limited number of fingers at our disposal. Second, the inserting of fingers merely delays the adverse effects of, rather than repairs, the structural weaknesses that caused the damage in the first place. For the cases that reach the writing stage (of which there are far too many), we are reduced to greater and greater dependence on the starry-eyed post-adolescents whom we call law clerks. This system—if we can call it that—lends itself to uncertainty, contradiction, and disuniformity. It also has a tendency to transform judges from thinkers to managers. In the process, we risk losing that precious commodity once thought to be our hallmark—the opportunity for "the sober second thought."⁸ Little wonder that the eminent scholar, Paul Bator, devoted the last essay of his life to a plea for reform, driven by the conviction that "at the court of appeals level, the appellate system is malfunctioning."⁹

All this is troubling, but, at least, it offers the small comfort of having a familiar ring. There is, however, a less remarked aspect to the case load crisis: the crisis of information overload.¹⁰ If the case load crisis is descriptive of the effect of more cases on the justice system, the "info-load" crisis limns the effect of more cases on the vocation of the law.

In 1962, thirty-nine shelf miles of books was a noticeable but bearable weight on the shoulders of the profession. Three decades later, the weight of the law is oppressive. Even with pinpoint subspecialization, it has become a half-time job for a lawyer to keep track of all the cases emerging on a daily basis in his or her small corner of the law. Federal appellate judges, who, like

⁷ Because the reversal rate has dropped sharply, it can also be argued that the courts of appeals have responded to increasing workloads by growing more deferential. I do not agree. I think the lower reversal rate more likely reflects the fact that a greater percentage of unmeritorious appeals are now being prosecuted. In the federal system, the appeal from the district court to the court of appeals has become, regrettably, the best bargain in the supermarket of modern litigation.

⁸ Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936); see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 26 (2d ed. 1986) (noting that "[t]heir insulation and the marvelous mystery of time give courts . . . the opportunity for 'the sober second thought.'" (quoting Stone, *supra*)).

⁹ Paul M. Bator, *What is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 678 (1990).

¹⁰ The few who have remarked upon the phenomenon include Judge Mikva and, especially, Judge Gibbons. See John J. Gibbons, *Maintaining Effective Procedures in the Federal Appellate Courts*, in JUDICIARY, *supra* note 6 at 22, 22–28; Mikva, *supra* note 6, at 1360.

it or not (and most of us relish the role), are compelled to function as generalists, can do little more than read what they can (in-circuit slip opinions, Supreme Court opinions, and *United States Law Week* alone absorb a high percentage of the available hours), then pray that they have chosen dependable clerks.

Much-heralded advances in technology have done little to ease the burdens. A prominent economist has made the intriguing point that, historically, household appliances advertised as "time-saving" have not saved time.¹¹ When laundry became easier to do, standards of cleanliness rose concomitantly, and consumers began to wash clothing at more frequent intervals.¹² Computer assisted legal research is much like laundry equipment in this respect. As cases remotely on point become ever easier to find, the expectations for research rise, courts crank out more opinions, lawyers write more briefs (citing more opinions), and opinions cite more opinions. The cycle then begins anew. All too often, the judges are drained.

To make matters worse, the quality of legal argumentation sometimes seems to vary in inverse proportion to the rate of citation. There is a vicious feedback effect between the infoload crisis and the case load crisis in its more familiar aspect, for one exacerbates the other. Information overload unsettles legal rights, because the assiduous associate can find support for any claim, no matter how tendentious. One result is that attorneys bring more actions and take appeals in a larger percentage of cases. Another result is that attorneys seed their briefs with more reasons for appeal, each complete with a compendium of authorities arguably in support of it. Judges proceed to decide the appeals and, in conscientious turn, address more and more issues per appeal. They then dutifully publish the resultant opinions, thereby contributing to the surfeit of information.

Many solutions have been proposed to the case load crisis in its various aspects, most being in the nature of structural reform. An American Bar Association commission recommended various forms of subject matter specialization, revitalized en banc procedures, and screening techniques.¹³ The Federal Courts Study Commission paid special attention to proposals for administrative streamlining and jurisdictional limitation.¹⁴ Many of these proposals are promising, but they will require time, money, and, in some

¹¹ JULIET B. SCHOR, *THE OVERWORKED AMERICAN* 87-88 (1992). The one exception to the rule is the microwave oven. *Id.* at 88.

¹² *Id.* at 88-89.

¹³ American Bar Association Standing Committee on Federal Judicial Improvements, *The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth* 41 (1989).

¹⁴ FCSC REPORT, *supra* note 6, at 171-86.

instances, legislative action. It seems to me that, while such reforms are in gestation, there is a change we can bring about quickly and inexpensively, through greater self-discipline. I believe that if the appellate judiciary were to take a harder look at restricting publication, it would be a step in the right direction.

Limited publication has several advantages. Most importantly, like other demand-side solutions, it strikes directly at the infoload crisis. By contrast, structural reforms improving the capacity of the courts to handle current loads would serve to deepen the infoload crisis. Moreover, some of these structural reforms will merely delay the inevitable. Add a few notches to his belt, and the fat man will eat more; print more money, and the government will spend more; make appellate judges specialists in narrow areas and, over time, there will be more judges, who will, as a group, write more about their pet topics.

What makes curtailed publication one of the more appealing of the demand-side solutions is that it takes effect at the source. Whereas limiting jurisdiction merely puts a lid on the steam pipe, generating pressure that will inevitably express itself in different forms of social conflict, limiting publication amounts to limiting fuel production—reducing the amount of coal with which the engine of litigation is stoked. Shortening published opinions, even assuming that such a step is desirable and feasible, would refine the fuel, but would not reduce the volume of its production.

When I speak of curtailed publication, I do not limit myself to conventional print. If an opinion should not be published, it should not be published either manually or electronically. To make an opinion available electronically defeats the whole purpose of the enterprise. If citation is permitted, then the infoload crisis worsens, and unfair advantage is bestowed on more affluent litigants. If citation is not permitted, then the transmission of the opinion is at best a tease and at worst an invitation to violate or evade the prohibitory rule. By now, every legal researcher has experienced many times the allure of the forbidden. In my view, then, the judiciary could take an important step in the right direction by ceasing electronic dissemination of any opinion not released for routine publication. The decision against electronic publication, after all, is (or should be) based on exactly the same criteria as the decision against publication altogether.¹⁵

By advocating self-imposed limits on publication, I do not mean to suggest that most cases should be terminated without opinion or by means of judgment orders. Rather, I envision more cases being decided in one of two ways. First, a far greater number of cases can be decided by means of full-dress opinions

¹⁵ A more radical step may merit consideration: the “depublication” of all existing opinions that have been published only in electronic form. Similar action has been taken on a large scale, for published opinions generally, in the California state court system.

intended specifically and exclusively for the eyes of the parties, in a form that is most commonly called the memorandum opinion. Memorandum opinions are no less thorough in their probing of the parties' assertions, but they need not rehearse the facts at great length, they need not collect cumulative citations for the sake of completeness, and they need not take three steps backward to survey the legal landscape, in the style of the great law reviews. In addition, I fail to grasp why appellate courts so often feel compelled to reinvent the wheel. In many cases, the district court has handed down a clear, complete opinion (whether written or *ore tenus* does not matter) that cuts to the heart of the matter. In most of those situations, it serves no purpose for a court of appeals merely to rephrase the district court's words. In my estimation, many more appeals can be concluded satisfactorily by affirmance substantially on the basis of the district court's opinion.

It may be useful to conceive of these approaches in terms of the three standard judicial functions. Memorandum opinions and "based-on" affirmances serve equally well the function of review for correctness, but they abandon (or, better put, dismiss as unsuited for the particular case) the function of developing the law in favor of the function of maintaining uniformity. Because there exists a large class of cases that provide little opportunity for the development of the law, increased use of memorandum opinions and based-on affirmances would not entail a sacrifice of judicial effectiveness along any of its three dimensions. In the short term, there would be a perceptible easing of the Briarean task of keeping current in the law. Eventually, perhaps, there would be an easing of the case load burden as well. And, as a by-product, appellate judges would gain more time for study and contemplative thought in respect to those opinions which will serve as beacons in the law.

There are four basic objections to limited publication, which double in brass as arguments in favor of universal publication. First, there is a tendency to sanctify publication as integral to the individual litigant's traditional "right to full adjudication."¹⁶ Second, some contend that nonpublication gives unfair advantage to chronic suitors or other parties who take the trouble to obtain and cite unpublished slip opinions, with the result that courts are misled as to the weight and trend of existing precedent.¹⁷ The third objection is that all opinions must be in plain view, for the public eye polices the quality of judicial craftsmanship. Knowing that their opinions will be scrutinized, as this thesis holds, judges who publish are less likely to succumb to ennui or to ignore complexities for the sake of convenience.¹⁸ They are also less likely to rest

¹⁶ See Mikva, *supra* note 6, at 1360.

¹⁷ FCSC REPORT, *supra* note 6, at 130.

¹⁸ See POSNER, *supra* note 4, at 122-23; cf. KARL LLEWELLYN, THE COMMON LAW TRADITION 313 (1960) ("The candor which in a full opinion forbids ignoring an

their decisions on normative grounds lying outside the broad social consensus.¹⁹ Finally, it is supposed that the vast majority of cases argued are genuinely precedential—either because situations that make their way up to appellate tribunals are by definition novel, or because the profusion of appeals may be traced to the need for elaboration in new areas of the law. Even if there exist some cases utterly lacking in precedential value, it is argued that judges and their staffs lack the capacity to identify those cases before formulating their views on paper.²⁰ I find none of these objections persuasive.

Flag-waving aside, publication rarely has been perceived as part and parcel of our jurisprudential heritage. Although a number of states in the nineteenth century passed statutes mandating publication, this development appears to have been driven by short-term political considerations and by resentment at the extreme practice of issuing reversals without opinion.²¹ In any event, the development has long since been arrested. The overwhelming majority of courts have found those provisions to be nonbinding, objectionable, unconstitutional, or otherwise undesirable.²²

The fairness concern, too, has little basis in reality. Differential access to opinions deemed unworthy of publication could easily be blocked by a refusal to release “not-for-publication” opinions to database proprietors, or by a hard and fast rule against citation, rigorously enforced. Zero access is the most evenhanded policy of all. Indeed, fairness may cut in the opposite direction. Universal electronic publication would create a new fairness problem of unimagined magnitude, because, for the foreseeable future, electronic databases are available in practice only to relatively well-heeled litigants.

uncomfortable authority must scorn equally its disregard in silence by way of a *Per Curiam*.”).

¹⁹ See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 124–57 (1990).

²⁰ See POSNER, *supra* note 4, at 122–23.

²¹ Max Radin, *The Requirement of Written Opinions*, 18 CAL. L. REV. 486, 487, 490 (1930) (discussing California experience).

²² The seminal case is *Houston v. Williams*, 13 Cal. 24 (1859) (Field, J.) (striking down statute mandating publication and statement of reasons, appropriately enough, without detailed statement of reasons). See also *Vaughan v. Harp*, 4 S.W. 751 (Ark. 1887); *City of Miami Beach v. Poindexter*, 119 So. 136 (Fla. 1928); *Baker v. Kerr*, 13 Iowa. 384 (1862); *Ex parte Griffiths*, 20 N.E. 513 (Ind. 1889); *Farwell v. Laird*, 51 P. 284 (Kan. 1897); *McCalls Ferry Power Co. v. Price*, 69 A. 832 (Md. 1908); *Turner v. Anderson*, 139 S.W. 180 (Mo. 1911); *State ex. rel La France Copper Co. v. District Court*, 105 P.721 (Mont. 1909); *Stevens v. State*, 76 N.W. 1055 (Neb. 1898); *Horner v. Amick*, 61 S.E. 40 (W. Va. 1908). But see *Ayres v. United States*, 44 Ct. Cl. 48 (1908); *Mestetzko v. Elf Motor Co.*, 165 N.E. 93 (Ohio 1929); *Hartford Fire Ins. Co. v. Galveston, H. & S.A. Ry.*, 239 S.W. 919 (Tex. 1922).

The remaining two objections are weightier. While openness and public scrutiny are to be prized, I am not suggesting that opinions be issued in a dark room at midnight, and immediately placed under seal. Unpublished opinions would remain public records. Quality would be adequately assured by professional pride, the vigilance of colleagues, and the possibility of further review. Even now, these, rather than some hypothetical mass public, furnish the primary checks on a judge's discretion. Moreover, if gains in quality result from publicity—and that is debatable, for judges concerned about publicity are often at risk of jeopardizing the detachment and impartiality that are so much a part of the judicial role—those gains are overwhelmed by the losses attendant to feeding the fires of the infoload crisis. The first premise of judicial reform of any kind must be that justice on an individual basis has greatly diminished value if it impairs the delivery of justice systemwide.

That leaves only the objection that the class of cases lacking precedential value is tiny to nonexistent. I cannot rebut this point scientifically, and many jurists might beg to differ, yet my decade on the bench has persuaded me that there exists a sizable class of such cases. Few appeals that fall within that category will be utterly devoid of worth. But for every instance in which such a case sheds light, there may be ten or twenty in which it obfuscates. To paraphrase Judge Gibbons, the accumulated wisdom of the ages took ages to accumulate—not two weeks.²³ I submit that, in the era of the infoload crisis, the burden of persuasion should be on those who perceive pearls of wisdom in every oyster.²⁴

I recognize that proposing reduced publication of judicial opinions is likely to prove simpler than accomplishing the goal. The suspicions of harried lawyers to the contrary notwithstanding, judges are human. Each of us, after committing our views about an appeal to paper, may well be struck by the deathless quality of the prose, or convinced that the most humdrum rendition of well-settled authority constitutes a landmark in the law. Fortunately, keen legal minds have grappled with the problem since the early years of the century and have developed several serviceable sets of guidelines to assist judges in deciding when to refrain from publication. There are two basic approaches. One looks to the nature of the decision reviewed; the other to the inherent value of the reviewing decision.

The earliest set of guidelines I have encountered takes the first approach. In a 1915 essay, Chief Justice John Winslow of the Wisconsin Supreme Court

²³ Gibbons, *supra* note 10, at 27.

²⁴ In deciding questions of publication *vel non*, it makes sense to err on the side of caution. A decision not to publish is easily correctable. If experience proves the initial judgment to be faulty, then the court may rectify the mistake by publishing the opinion at a later date. But once the djinni is out of the bottle, it cannot readily be confined.

advocated a strong presumption ("absent exceptional importance") against the publication of affirmances in general, and a *per se* rule against publication of routine affirmances, that is opinions involving only questions of fact, or repastinating ground covered by existing precedent.²⁵ The former Chief Judge of the Third Circuit, Judge Ruggero Aldisert, has updated this approach to take into account the existence of the administrative state and draws out the approach's logic. In Judge Aldisert's view, an opinion should be published when the judgment of the trial court is reversed (or, in the same vein, when a petition to review an administrative agency action is granted). Conversely, an opinion should not be published when the decision does no more than carry out the appellate court's error-correcting function and affirms the judgment (or enforces the order of an administrative agency).²⁶

The alternative approach places greater emphasis on the attributes of the reviewing decision itself. For instance, the Federal Judicial Center suggested two decades ago that no appellate opinion should be published unless it lays down a new rule of law, alters or modifies an existing rule, criticizes existing law, resolves an apparent conflict of authority, or involves a legal issue of continuing public interest.²⁷

The Seventh Circuit's current policy, which may be taken as the state of the art, synthesizes the two approaches. On one hand, it adopts much of the Federal Judicial Center's paradigm, while broadening the concept of intrinsic value; on the other hand, it incorporates elements of the Winslow-Aldisert approach, while modulating that approach to take into account the peculiar institutional status of an intermediate appellate tribunal. In the Seventh Circuit:

A published opinion will be filed when the decision

- (i) establishes a new, or changes an existing rule of law;
- (ii) involves an issue of continuing public interest;
- (iii) criticizes or questions existing law;
- (iv) constitutes a significant and non-duplicative contribution to legal literature
 - (A) by a historical review of law,
 - (B) by describing legislative history, or
 - (C) by resolving or creating a conflict in the law;

²⁵ John B. Winslow, *The Courts and the Papermills*, 10 ILL. L. REV. 157, 161 (1915).

²⁶ See RUGGERO J. ALDISERT, OPINION WRITING 21 (1990).

²⁷ ADVISORY COUNCIL OF APPELLATE JUSTICE, REPORT OF THE COMMITTEE ON USE OF APPELLATE COURT ENERGIES, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (FIC Research series No. 73-2, 1973), *excerpted in* APPELLATE JUDICIAL OPINIONS, *supra* note 2, at 314-19.

- (v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or
- (vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.²⁸

One can quarrel with these guidelines, but it is surpassingly difficult to quarrel with the principle for which they stand. Stringent guidelines, meticulously followed, coupled with a presumption against publication, would go a long way toward reducing the infoload crisis. Unfortunately, as Judge Gibbons accurately notes, even in circuits with strict rules on the books, the practical criterion for publication is the amount of time that the judge puts into an opinion.²⁹ The trick, of course, is self-discipline, for the most thoughtful set of rules will not slow the stream of published opinions unless judges take the rules to heart and pay them more than lip service.

To recapitulate, curtailing publication will do no harm—and it promises to do some good. It will be welcomed by a diverse constituency, ranging from the bleary-eyed to those who yearn for greater clarity in the law. It will also ensure the quality of our developing jurisprudence. And it may be the last, best hope of the appellate judiciary. Opinion writing is far from an exact science, and good opinions, like well-made suits of clothes, are best when custom tailored. The work is labor-intensive. Because published opinions require extra pains, reducing the number of published opinions will allow judges to devote more time and energy to the elucidation of important legal principles in cases that warrant great care and contemplative thought.

Two centuries ago, Lord Mansfield lived by the following heroic maxim: “I never give a judicial opinion upon any point, until I think I am master of every material argument and authority relative to it.”³⁰ In these more hectic times, judges are faced with the choice of either reducing the number of full-dress opinions or lowering the level of mastery to which they aspire. The better choice is clear. Unless we are to defenestrate the ideal of Lord Mansfield—and I think we all agree that we should cling to it—judges must begin to think more and write less.

²⁸ 7th Cir. R. 53, *reprinted in* Aldisert, *supra* note 26, at 15–17.

²⁹ Gibbons, *supra* note 10, at 26.

³⁰ *Rex v. Wilkes*, 98 Eng. Rep. 327, 339 (K.B. 1770).